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In The

Supreme Court of the United States

October Term, 1982

IN RE GRAND JURY PROCEEDINGS INVOLVING

ROBERT STEPENY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court had the power to interrupt a prior federal criminal sentence by the imposition of a civil contempt sentence, without express statutory authority.

2. Whether the imposition of a civil contempt sentence is violative of petitioner's constitutional rights under the Fifth, Sixth and Eighth Amendments.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Orders and Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 5

Reasons for Granting the Writ:

I. The interruption of a prior federal criminal sentence by the imposition of a civil contempt sentence is beyond the scope and power of a district court, unless expressly authorized by statute. 6

II. The imposition of a civil contempt sentence is violative of petitioner's rights under the Fifth, Sixth and Eighth Amendments of the Constitution. 8

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Cheff v. Schnackenberg, 384 U.S. 373, 86 S. Ct. 1523 (1966) 9

Contents

Page

In re Grand Jury Investigation, 542 F.2d 166 (1976) 8

Martin v. United States, 577 F. 2d 906 (1975) 8

Piemonte v. United States, 367 U.S. 556, 81 S. Ct. 1720 (1961) 9

United States v. Dien, 598 F. 2d 743 (1979) 9

United States v. Levine, 288 F. 2d 272 (1961) 9

United States v. North, 621 F. 2d 1255 (1980) 7

United States v. Regan, 503 F. 2d 234 (1974) 7

Statutes Cited:

18 U.S.C. §3568 ..... 3, 6, 7

18 U.S.C. §6002 5

18 U.S.C. §6003 5

28 U.S.C. §1254(1) 2

28 U.S.C. §1826 6

28 U.S.C. §1826(a) 3, 6

United States Constitution Cited:

Fifth Amendment ..... i, 2, 8, 9

Contents

Page

Sixth Amendment ..... i, 2, 8

Eighth Amendment ..... i, 3, 8, 9

Rule Cited:

Federal Rules Criminal Procedure, Rule 35 ..... 4, 7

APPENDIX

Order and Informal Opinion of the United States Court of Appeals for the Second Circuit 1a

No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Robert Stepeny respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 15, 1982.

ORDERS AND OPINIONS BELOW

The order and informal opinion of the United States Court of Appeals for the Second Circuit appears in the appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 15, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Code, Title 18:

"Section 3568

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term 'offense' means any criminal offense which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

No sentence shall prescribe any other method of completing the term."

United States Code, Title 28:

"Section 1826(a) Recalcitrant witness

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the

United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of . . .

1) the court proceeding or

2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

Federal Rules of Criminal Procedure:

"RULE 35. Correction or Reduction of Sentence

The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. "

STATEMENT OF THE CASE

On January 21, 1982, Robert Stepeny was summoned to testify before a Grand Jury in the Southern District of New York which was conducting an investigation into alleged violations of the narcotics laws. Due to previous commitments, Mr. Stepeny's attorney was unable to appear on this date so a further appearance was scheduled for January 28, where Mr. Stepeny appeared with counsel and asserted his Fifth Amendment privilege against self-incrimination. Mr. Stepeny's next appearance before the Grand Jury was on February 18, 1982. He testified briefly concerning the charges to which he had pleaded guilty in 1980 and received a sentence of fifteen years, imposed by the Honorable Pierre N. Leval, United States District Judge for the Southern District of New York on February 14, 1980. After consulting with his attorney, Mr. Stepeny asserted his privilege against self-incrimination and refused to answer any further questions. He was then granted immunity under 18 U.S.C. §§6002 and 6003. Mr. Stepeny again asserted his privilege and refused to answer any further questions. Immediately thereafter, Mr. Stepeny, accompanied by his attorney, appeared before the Honorable David N. Edelstein, United States District Judge for the Southern District of New York. The prosecution petitioned the district court for an order directing Mr. Stepeny to testify or to show cause why he should not be held in civil contempt. Mr. Stepeny sought and was granted an adjournment until February 23, 1982. He was further advised by the court that upon his failure to answer all questions, a severe sentence would be imposed.

Mr. Stepeny appeared before the Grand Jury on February 23 and refused to testify concerning certain activities. He was then given an opportunity to consult with counsel, and at Judge Edelstein's direction, scheduled to appear before the Grand Jury on February 25. On Feburary 25, Mr. Stepeny again refused to testify on the basis of his privilege against self-incrimination.

Later that day, a hearing was held before Judge Edelstein. During this hearing Mr. Stepeny's attorney offered no reasons for his client's refusal to testify, and the court made no effort to ascertain whether Mr. Stepeny had any sufficient reason for such refusal. The court further assumed that Mr. Stepeny's refusal to respond to all questions was without reason and adjudged Mr. Stepeny in contempt and sentenced him to confinement pursuant to Title 28, United States Code, Section 1826(a).

REASONS FOR GRANTING THE WRIT

I.

The interruption of a prior federal criminal sentence by the imposition of a civil contempt sentence is beyond the scope and power of a district court, unless expressly authorized by statute.

Section 1826(a) of Title 28 provides for the confinement of a recalcitrant witness for a period not to exceed eighteen months where the witness refused, without just cause, to comply with an order to testify.

In reliance upon this section and upon a line of cases that encompass seven other circuits, the Second Circuit has here held that the power of the district court to interrupt a federal criminal sentence when imposing the civil contempt sanction for refusal to answer questions before a Grand Jury, is beyond argument. *See* pages 1a-3a of the appendix, *infra*.

The evolution and continued existence of this holding as the prevailing rule of law is based upon the belief that 28 U.S.C. §1826 and 18 U.S.C. §3568 give to the district court, clear and unambiguous authority to impose such a sentence under any circumstances. However, an examination of these statutes reveals no express statutory grant of authority, which is the foundation

from which the powers of the district court are derived. *United States v. Regan*, 503 F. 2d 234, 238 (1974). Absent an express statutory grant, the district court is without power to issue an order affecting its judgment. *United States v. Regan, supra.*

Furthermore, absent express statutory authority, any practice which has the effect of modifying the express statutory language in the last sentence of 18 U.S.C. §3568, which, in turn, proscribes any method of computing the term of sentence, other than the method prescribed therein, cannot stand as a valid, legal exception to the sentencing provisions unless duly enacted by the Legislature and made a part thereof.

An examination of Rule 35 of the Federal Rules of Criminal Procedure and the application of this holding achieves a similar result. Pursuant to this rule, a sentence may be modified only within 120 days after the sentence is imposed, or after it has been affirmed on appeal. The Second Circuit, in allowing the interruption of the prior criminal sentence has, in effect, permitted a modification of the previously imposed sentence approximately two years after its imposition. Again the actions of the Second Circuit contravene express statutory language and create an exception not contemplated by the Legislature. Rule 35 clearly limits the power of a district court to touch or otherwise interfere with a criminal sentence after 120 days. *United States v. North*, 621 F. 2d 1255, 1266 (1980) (dissenting opinion).

These conflicts justify the grant of certiorari to review the judgment below.

II.

The imposition of a civil contempt sentence is violative of petitioner's rights under the Fifth, Sixth and Eighth Amendments of the Constitution.

The Second Circuit's decision regarding petitioner's contentions of constitutional violations is, admittedly, a reflection of the current state of law. However, as meritless as petitioner's claims may seem at first glance, the real effect of this decision raises questions about the basic "fairness" of imposing civil contempt sanctions on previously sentenced criminal offenders.

At the very least, any meaningful parole consideration is delayed by that period of time attributed to civil confinement. *In re Grand Jury Investigation*, 542 F. 2d 166, 172 (1976) (dissenting opinion). Further consequences may result when consideration is given to the possibility that double or triple punishment may be imposed for repeated refusals to testify. *Martin v. United States*, 517 F. 2d 906 (1975) (dissenting opinion). The most dire consequence arises when, as in the instant case, the petitioner refuses to answer questions concerning events for which he has already been convicted and sentenced. Upon petitioner's failure to disclose previously unobtainable information he was sentenced to an additional term of imprisonment for essentially the same activities which resulted in his first conviction. By answering the questions posed to him, petitioner would have placed himself and his family in a life-threatening situation. The sentencing court's failure to consider these consequences and their effect on innocent family members has to be seen as something more than a coercive measure. While petitioner assumed this risk when he elected to become involved in criminal activities, the same cannot be said for petitioner's immediate family and their respective families. The sentencing court's assumption that petitioner's refusal to testify was without reason, without inquiring

of the petitioner himself, was insensitive and purely subjective. Although petitioner's fears of reprisal do not justify his refusal to testify, this factor has been considered as one of mitigation in other cases. *United States v. Levine*, 288 F. 2d 272 (1961).

If the situation is examined as a possible constitutional violation, the petitioner's refusal to answer questions concerning activities for which he was previously convicted and sentenced, amounts to the imposition of a second sentence for the same events. When the only other option poses a life-threatening situation, not only to himself, but others, the grant of immunity is rendered worthless. *United States v. Dien*, 598 F. 2d 743, 745 (1979) (dissenting opinion) ; *Piemonte v. United States*, 367 U.S. 556, 81 S. Ct. 1720 (1961) (dissenting opinion). In light of these results, the "double jeopardy clause" of the Fifth Amendment, and the "cruel and unusual punishment clause" of the Eighth Amendment, are effectively reduced in stature and meaning.

Equally serious is the effect rendered on the right to a jury trial, and the question of whether a civil contempt sentence which imposes a maximum term of eighteen months can really be considered a civil sentence. The Second Circuit has relied on a line of cases which support the rule that there is no right to a jury in civil contempt cases. These cases, in turn, rely on the coercive character of a civil contempt sentence, as opposed to the punitive character of criminal contempt. However, the length of the sentence should also be considered. In *Cheff v. Schnackenberg*, 86 S. Ct. 1523, the defendant was convicted of criminal contempt and sentenced to six months imprisonment. The court ruled that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. Justice Douglas, in his dissent with whom Justice Black concurred, reasoned that a trial for the crime of criminal contempt was required regardless of the term of sentence. The decision by the Second Circuit, gives one convicted of criminal

contempt and receiving a sentence in excess of six months, greater rights by the insurance of a jury trial than one convicted of civil contempt and receiving an eighteen month sentence. The petitioner's sentence of eighteen months made the charge of civil contempt an accusation of a crime, and all the constitutional safeguards available to an accused in a criminal trial should be extended to the petitioner.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Attorney for Petitioner